No. 1149

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. SCHWARTING, Master and Claimant of the German barque, "Robert Rickmers," her tackle, apparel and furniture,

Appellant,

vs.

THE STIMSON MILL COMPANY, a corporation,

Appellee.

Brief of Appellant.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF WASHINGTON, WESTERN DIVISION, SITTING IN ADMIRALTY.

JAMES M. ASHTON,
FRANK H. KELLEY,
Proctors for Appellant.

The Bell Press, Tacoma.

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BRIEF OF APPELLANT

STATEMENT OF THE CASE.

This is a cause of collision, civil and maritime, in which the libelant, as the managing owner of the schooner "Stimson," complains of the "Rickmers" and alleges that the "Rickmers" was improperly, insufficiently and unskillfully moored with insufficient and defective cables; that the "Rickmers" was improperly and unskillfully managed and handled; and, because of these failures of duty, the "Rickmers" dragged her anchors on the night of December 25th, 1901, and came into collision with the "Stimson," causing damage in the amount of $22,500.

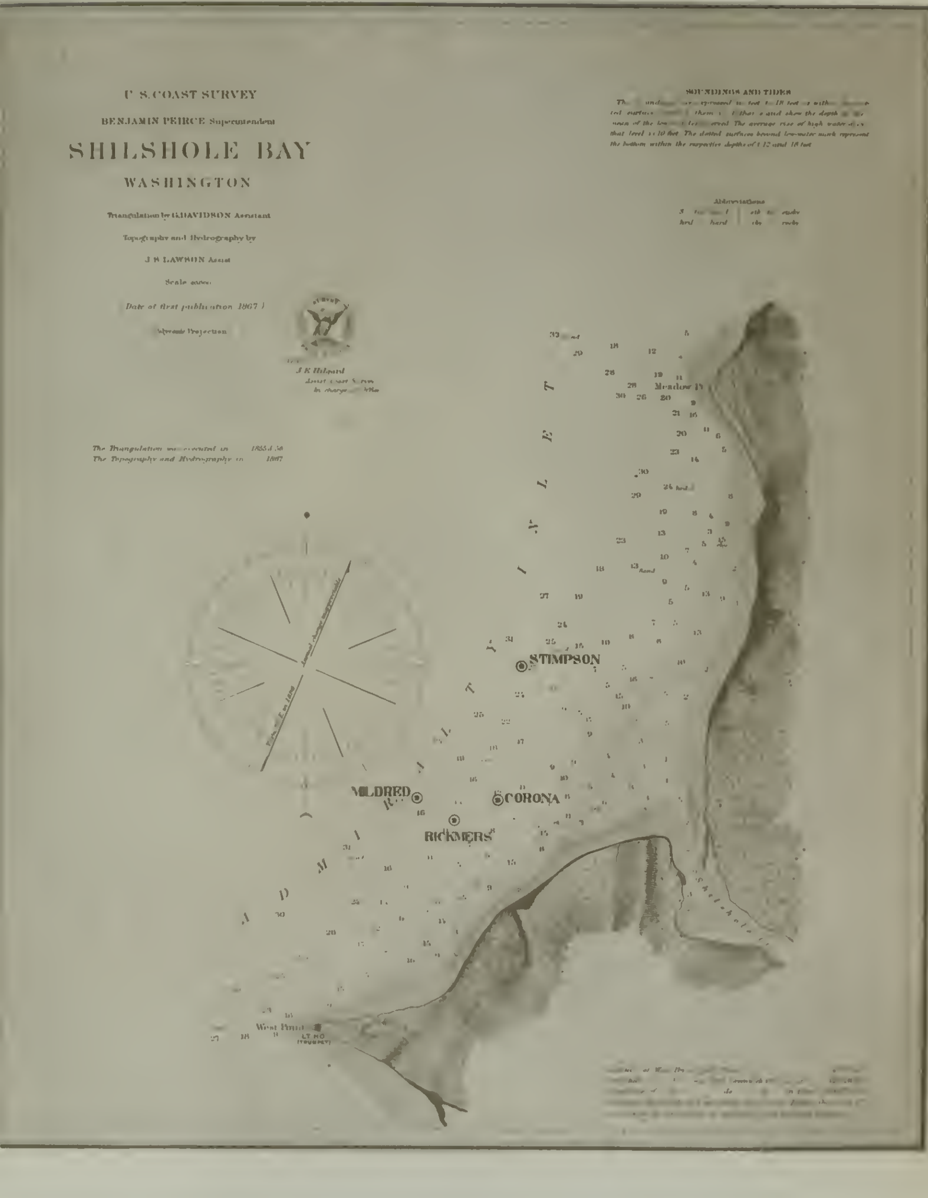
The libel alleges also that the "Rickmers" was saved

from going ashore by holding onto the ground tackle of the "Stimson"; but this claim was abandoned.

Answering the libel, the claimant denies the charges of negligence and failure of duty, and denies that any act or failure to act on the part of the "Rickmers" caused or contributed to the collision; and alleges further that the "Stimson" herself was in fault in that she did not maintain a proper and efficient anchor watch and did not take steps within her power to avoid the collision or to minimize the results. These being the issues, the following are:

Facts Not in Dispute:

The "Rickmers" is a barque of about 2,200 tons. She arrived inward bound, in ballast, at Port Dungeness on December 24th, 1901, and came to anchor near Dungeness. There she remained until 11:30 o'clock p. m., when she weighed anchor and started up sound for Tacoma in tow of the tug "Tacoma," whose master was Captain H. H. Morrison, a licensed pilot. The master of the barque was C. Schwarting, who was making his first voyage to Puget Sound. About 4 o'clock p. m. on December 25th the tug and her tow had reached a point a little north of West Point light, and, the wind having freshened, the pilot and master of the tug directed his course to the eastward, signalled the barque to prepare to anchor, and took her to a temporary anchorage in Shilshole bay at a point about three-quarters of a nautical mile distant from and bearing north 33 degrees east (true) from West Point light. The wind at this time was westerly and was no more than a


U. S. COAST SURVEY
BENJAMIN PEIRCE Superintendent
SHILSHOLE BAY
WASHINGTON
Triangulation by G. DAVIDSON Assistant
Topography and Hydrography by
J. S. LAWSON Assist.
Date of first publication 1867
J. E. Hilgard
SOUNDINGS AND TIDES
Abbreviations
Meadow Pt.
STIMPSON
MILDRED
CORONA
RICKMERS
West Point
LT. HO.

fresh breeze. Lying at anchor in Shilshole bay at this time were three schooners, the "Mildred," of 411 tons, lying at a point which bore from West Point light north 23 degrees east (true), and distant about three-quarters of a nautical mile; the "Corona," of 394 tons, at a point which bore from West Point light north 38 degrees east (true), and distant about seven-eighths of a nautical mile; and the "Stimson," at a point which bore from West Point light north 29 degrees east (true), and distant about one and one-quarter nautical miles. The relative positions of these vessels at the time the "Rickmers" came to anchor are shown on the reduced reproduction of an official chart of Shilshole bay, upon which the position of the vessels was indicated by the witnesses. (See Claimant's Exhibits Nos. 1, 11 and 12.) The chart upon the opposite page is a photographic reproduction of the chart of Shilshole bay, showing the position of the vessels.

In coming to anchor the "Rickmers" dropped her port anchor, and about that time the port compressor block carried away and about fifteen fathoms of the port chain ran out. The barque sagged off to leeward and a collision with the "Corona" was imminent, but was avoided by the prompt and seamanlike action of the "Corona's" master, who hoisted his forestaysail and sheered his schooner in shore. The tug was standing by and, passing a line to the barque, hauled her back to her anchorage. The barque then dropped her starboard anchor, and lay in safety at both anchors until late in the evening, having rigged a relieving tackle on her port cable to take the place of her broken compressor. This compressor is an iron contrivance to hold fast to a link of the anchor chain by binding

it in a block made to conform to the shape of the link, and is intended to take the strain off the windlass while the vessel is at anchor. It is mounted on a large block of greenheart wood and is bolted through to the deck beams. It is spoken of by some of the witnesses as a riding chock.

At about 10 o'clock p. m. of December 25th the wind increased and blew violently from the south and southeast. The relieving tackle on the port chain carried away, a large hook in one of the locks having straightened out under the strain, and the barque began to drag, her starboard anchor having failed to hold her under the weather conditions then prevailing. More scope was given to the starboard chain, but she continued to drag and came athwart the bows of the "Mildred" and into collision with her, carrying away her jibboom and inflicting other damage. The barque finally broke loose from the "Mildred," passing along her port side, and then drifted down onto the "Stimson," having payed out in the meantime 90 fathoms of her starboard chain and having rigged a second relieving tackle on her port chain. When this second relieving tackle was rigged it was discovered that her port anchor and about ten or fifteen fathoms of her port chain had been carried away and lost.

The "Stimson" was lying to 105 fathoms of cable at a single anchor. Her master was ashore and the vessel was in charge of the mate. An anchor watch of one man was posted. From the time when the "Rickmers" came into collision with the "Mildred" to the time of her collision with the "Stimson" not less than a half-hour elapsed. The "Stimson's" watchman did not report to

the officer in command of the "Stimson" the fact that a vessel to windward was dragging, or was in collision or other trouble, until a very few moments before the collision between the "Rickmers" and the "Stimson" occurred, and no steps were taken by the "Stimson" to avoid or to minimize the effect of the collision. The vessels were in collision for some time and each received much damage. The ground tackle of the "Stimson" was not sufficient to hold them both and they sagged to leeward, locked together. At length they broke apart and the "Stimson" brought up on her own ground tackle. The barque drifted a short distance further and also brought up on her own ground tackle. The wind was very heavy and severe, blowing in gusts of great violence at times, but the weather was clear and lights and other objects could be seen without difficulty. Both vessels had the proper lights burning brightly. It was high tide at Shilshole bay on December 25th, 1901, at about 2:48 p. m., and extreme low tide at about 10:41 p. m.

Facts in Dispute:

If the opinions of expert witnesses are excepted, there are singularly few matters of evidence upon which the witnesses do not agree substantially. The claimant asserts that it is the custom of Puget Sound ports, where pilotage is not compulsory, for the master of the tug having a vessel in tow to act as pilot in taking vessels up and down the sound. The claimant has offered evidence to support this assertion and the libelant has not attempted to refute it.

Testimony of Capt. Burleigh, Record, p. 243.

Testimony of Alex. Baillie, Record, p. 246.

The claimant asserts further that the barque's anchorage was chosen by the master and pilot of the tug, and the libelant admits this to be true, but says that the barque's master expressed his satisfaction with the anchorage selected, whereas the master himself says that he did not want to anchor.

Testimony of Capt. Schwarting, Record, p. 33.

Testimony of Capt. Morrison, Record, p. 427.

In this connection it is but fair to say that Captain Schwarting's statement may well be held to mean that he did not desire to come to anchor at all, rather than an expression of dissatisfaction with the anchorage chosen; and this interpretation is in harmony with other parts of Captain Schwarting's testimony. See

Testimony of Captain Schwarting, Record, p. 57.

The testimony is conflicting to a certain extent as to what happened when the barque first came to her anchorage in Shilshole bay. The testimony of the master and officers of the barque is not clear in this and in other respects, owing to the fact that they were foreigners and gave their testimony in a language unfamiliar to them and did not comprehend fully the questions asked. Braue, the mate of the barque, was in the best position to know what really occurred. He says the wind was coming round West Point in gusts and that when the port anchor was dropped and the strain came upon the chain the port compressor block split, the compressor broke, and about

fifteen fathoms of the port chain ran away. He does not know whether or not the vessel dragged at this time.

Testimony of Braue, Record, pp. 61, 62, 73, 74, 75.

There was an attempt on the part of the libelant to show that the "Rickmers' " port chain broke and her port anchor was lost at the time the port compressor was destroyed; and, consequently, it was negligence not to "sight" the port anchor after the mishap to its compressor block. This contention is refuted entirely by the evidence. Mate Braue testifies that after the compressor broke the barque was brought back to her anchorage in part by heaving in on the port chain before dropping the starboard anchor.

Testimony of Braue, Record, pp. 65, 77.

Captain Schwarting testifies that the slack of the port chain was overhauled, and that the chain did not break, in his opinion, until the large hook on the relieving tackle straightened out when the vessel went adrift some six or seven hours later.

Testimony of Captain Schwarting, Record, pp. 32, 47.

There is no testimony tending to show that any of the ground tackle or appliances of the "Rickmers" was defective in any way; on the contrary, there is positive and direct testimony that the vessel was well found in these matters, and that her ground tackle and other appliances were inspected, in accordance with the custom of seagoing vessels, three or four days before she reached Cape Flat-

tery, and were found to be in first class order and condition. See

Testimony of Boehnke, Record, pp. 114, 115, 116.

Testimony of Schwarting, Record, pp. 38, 39, and certificates of Lloyds' Proving House, pp. 55, 56; certificates of Bureau Veritas, pp. 129, 130.

Testimony of Hill, Record, pp. 272, 274.

Testimony of Walker, Record, pp. 288, 289.

It is submitted that the whole testimony shows that when the "Rickmers" came into Shilshole bay to anchor there was a fresh breeze blowing, which came at times in strong gusts around West Point. When she dropped her port anchor it did not catch immediately, and the vessel, under the influence of the gusts which blew around the point, began to go to leeward directly in the way of the schooner "Corona." When her anchor caught, it brought up with a jerk upon the compressor, which split the compressor block and wrecked the appliance. Any claim that the compressor was applied prematurely, as the libelant's proctor asserted in his argument in the court below, is preposterous, because the vessel was increasing her momentum by every moment's delay, and the compressor was the only thing which could hold her and prevent a collision with the "Corona"; indeed, a collision was averted only by the fact that the "Corona's" master was a capable seaman, prompt to act in an emergency. Later in the day, if the "Stimson" had been handled as ably, the case at bar would not have occurred.

THE LAW OF THE CASE.

We propose to discuss first the twelfth assignment of error:

> *The court erred in allowing as damages five thousand dollars ($5,000) for estimated permanent damage by impairment of the salable value of the libelant's vessel.*

We desire to call the attention of the court to the character and weight of the testimony offered on this question, and we therefore quote verbatim from the record all of the testimony offered upon this point, in full confidence that this court will agree with the learned jurists who have passed upon questions of a like nature and will decide that there is nothing except mere conjecture upon which to base this allowance of damages.

Robert Moran, a shipbuilder, who was called by the libelant as one of three surveyors of the damage to the "Stimson," and who afterward executed part of the repairs, testified as follows:

Q. Now, you have stated that this estimate of $8,500 is an estimate of what it would cost to repair, as far as she could be repaired, estimating that such repairs were made; what, in your opinion, would be the fact as to whether the ship would be as valuable as she was before the collision?

A. Well, it would be impossible; it could not be as valuable.

Q. What, in your opinion, would be her damages, then, after being repaired as fully as

would be practicable, in accordance with your survey and in excess of the cost of making such repairs?

A. The damages this ship sustained and the depreciation, after the repairs had been made in accordance with these specifications, I should judge would be probably ten per cent.

Q. Ten per cent. of her value?

A. Ten per cent. of her value, in my judgment.

Q. In other words, her permanent damages, which could not be overcome by any repairs put upon her, would be ten per cent. in addition to the cost of repairing her as fully as she could be repaired?

A. That is my judgment.

Q. What would that amount to, in your opinion; in other words, what would have been the original value of the ship before the collision?

A. Well, I am not advised as to the exact value of the ship, but I presume her value new would be probably $50,000 or $60,000. I did not examine her particularly as to her exact value new. So that would make from $5,000 to $6,000—10 per cent.—permanent damages.

Testimony of Moran, Record, pp. 155, 156.

H. K. Hall, also a surveyor, called by the libelant to estimate the "Stimson's" damages, and who afterward executed part of the repairs, testified as follows:

Q. You may state, also, Captain, whether the estimate by you of the extent of these damages, to-wit: $8,500, for the repair of the vessel, and $1,000 for discharging and re-

loading her, was a fair and reasonable estimate?

A. It was.

Q. I will ask you to state whether the repairs of the ship as contemplated by this report and appraisement would put the ship back in the condition that she was immediately before the collision which caused these damages?

A. It would not.

Q. Well, why not?

A. Because the strain that had been put upon the vessel, the wrenching and the twisting that were caused by the collision, had damaged that vessel to an extent that could not be replaced by any repairs that could be put upon her.

Q. Would that affect the life of the ship?

A. It would take the vitality, I should say, of at least 10 per cent. out of the vessel.

Q. Now, for making the repairs contemplated by that survey: how much, if any, would you say that that ship was worth less than it was immediately before the collision which caused these damages?

A. Well, I should say she was worth 10 per cent. less.

Q. Well, how much in money—you are acquainted with the value of ships of that character—how much would you measure that in money—damage, I mean?

A. Well, I should say about $6,000.

Testimony of Hall, Record, pp. 164, 165.

On cross-examination this witness testified:

Q. You say that you estimate the permanent damages to this schooner at 10 per cent.?

A. Yes, sir.

Q. How did you arrive at that?

A. I placed the valuation of the vessel at about $60,000.

Q. Well, was there anything strained or broken about the vessel or the hull of the vessel?

A. There was something remarkable that showed a tremendous strain that had been wrought upon that vessel; the masts from the deck down to the keelson, where it was stepped into the keelson, had been strained, a severe strain that came upon the masts had split the keelson for the length of 60 feet, and it was ruined.

Q. Did you renew that?

A. Yes, sir.

Q. That is included in your bill, is it?

A. Yes, sir.

Q. Now, after you renewed them, did not that make her as strong as before?

A. Made her as strong as before, that portion of the work, fully as strong as before.

Q. And that would apply as to the other repairs that you made, would it not?

A. All the other repairs; yes.

Q. Be just as good as they were before?

A. As far as the repairs are concerned; but it don't relieve the vessel from the strain.

This constitutes all the testimony bearing on the question, and upon this testimony the court below assessed damages on this item in the amount of $5,000. An analysis shows that there is not one single fact other than the mere opinion of the witness upon which to base a conclusion. There is no testimony of any physical defect not capable of economical repair; on the contrary, the testimony is voluminous, particular and minute as to the repairs that were made, and there is not a single word in it which shows or tends to show that complete repairs were not made. The entire sum expended, for which the court below allowed damages in full in the sum of $9,388.00, is in itself sufficient to warrant the belief that neither the owners nor the builders stinted themselves in any particular in making these repairs.

Judge Woodruff of the Circuit Court for the Eastern District of New York had occasion to pass upon this question in the case of *Petty vs. Merrill* on appeal from decree of the District Court allowing damages exactly like the damages allowed in the case at bar, upon testimony which was of a like nature. In his opinion Judge Woodruff says:

> "I am not satisfied that, upon such testimony, five hundred dollars should be allowed in addition to the cost of repairs. It rests upon no certain or definite grounds for an estimate. The witness had stated all the cost of making the vessel as good as she was before; and then, having stated that she would, nevertheless, not be so valuable, he states that she would be as serviceable; and, finally, the cross-examination shows that his estimate

of five hundred dollars less in value rests upon a conjecture, based upon what he states as a general result of all collisions—that the vessels sustain a damage that will show when they grow old. This is altogether too vague, uncertain and unreliable to warrant the inference as a fact in this particular case that, beyond any injury which the witness could detect by his careful examination as an expert in building and repairing vessels, she had also received some undiscovered and undiscoverable damage which, although it did not render her less serviceable, yet detracted five hundred dollars from her value because it would show when she was old. The elements of calculation or estimate of amount are wanting. Palpably, the assumed fact of such hidden injury and its extent and character are conjectural, and the amount of money required as an indemnity is even more so. It may be conceded that the shock of a violent collision will be felt throughout the vessel; but the injury from that cause, if any, is not to be estimated, and cannot be determined as a matter of fact in a court of justice, by reasoning on any general rule such as appears to have guided the witness, if, indeed, his estimate was anything more than a rough guess without any specific facts to support it. No two collisions are alike in any of their circumstances or results. The injury in any given case must be quite peculiar if the skill of the shipbuilder, at liberty to employ all the expense requisite, is incapable of repairing it; and when a vessel is made as serviceable as she was before, any conjecture that she is not as valuable, or that, when she is old, some damage will appear, as a result of the collision, not now discoverable, is too vague and uncertain to warrant a

finding of the conjectural amount of damage. There may be proof of injury which, though known, cannot be repaired without unreasonable cost, where the party to be charged will be benefited by an allowance for actual depreciation, because an attempt to make complete repairs would involve an expense greatly disproportionate to the amount of such depreciation. But, in general, estimates of depreciation, founded on speculative opinions of the probable effect of a collision, where no such effect is known or discernible, and estimates of diminished value, founded, as they sometimes are, upon the idea that, although the vessel is as serviceable as she was before, yet she will not sell for as much as she would before, are not of sufficient reliability to warrant the taking of the money of one party and awarding it to another."

Petty vs. Merrill, 9 Blatchf. 447, s. c. Fed. Cases No. 11,050.

Judge Woodruff's reasoning is sound in principle, and has been followed whenever an attempt has been made to mulct a respondent in damages for injuries of this character. Judge Brown of the District Court for the Southern District of New York cites and follows *Petty vs. Merrill* in the case of the "Excelsior" (17 Fed. 924), and, later, follows the principles of the case in deciding in favor of an allowance for permanent depreciation in the "Helgoland" (79 Fed. 123), in which he points out clearly the rule to be followed, saying:

"The allowance here is not on the vague notion that she is not as good, or will not sell for as

much, simply because she has been in collision, when everything discoverable has been apparently rectified and repaired. Here what remains is palpably not repaired, and could not be without great expense.''

In *Sawyer vs. Oakman* the same court decided the same question in the same way, the opinion stating:

''The sum claimed by the libelants for estimated depreciation I must disallow. It is, as stated in the commissioner's report, 'to a very great extent a matter of conjecture.' On very clear proof of actual depreciation and of the extent thereof, where it was shown that from the peculiar nature of the injury it was impossible to make the vessel as good as she was before her injury, I have, in one case of collision, made an allowance for depreciation over and above the loss of the use of the vessel and the necessary expenses of repairing, etc. But such allowance should only be made upon proof that is clear and that furnishes a safe guide in determining the amount. From the nature of the subject, the opinions of witnesses, resting largely on grounds that have no relation to the actual value and condition of the vessel when completely repaired, are wholly unsafe and can be tested by no appreciable rule of estimate. To act upon them is to expose respondents to great danger of injustice, when substantial justice to the libelants does not require it. The commissioner reports that the schooner, by the repairs put upon her, was restored so as to be as strong as she was before the accident, and that she was thereby rendered as valuable to her owners for their own use and employment as she was

before. If that be so, then she was as valuable to any other persons for their use and employment. But he is of the opinion that she would not sell for as much as she would have sold for if the disaster had not occurred. I think it quite probable that market price is, in such a matter, so sensitive that it might be difficult to satisfy a proposed purchaser that the vessel was as valuable as before, or difficult to satisfy him that he would in future, should he desire to sell, be able to produce that conviction in the mind of a purchaser from himself. But the fact being true that the vessel is just as good as she was before the accident, the respondents having, by the sum otherwise awarded as damages, made her so, every attempt to estimate the influence of a purchaser's timidity or incredulity on her market value must be of the most uncertain and vague conjecture, not resting on any sound reason. It is quite too loose to be the foundation of a charge against the respondents."

Sawyer vs. Oakman, 7 Blatchf. 290.

s. c., Fed. Cases No. 12,402.

s. c., 5 Am. Law Rev. 381.

Sawyer vs. Oakman presented several questions of interest and has been cited extensively, and is cited as an authority by the United States Supreme Court. See

Smith vs. Burnett, 173 U. S. 433.

The same question was decided in the case of the "Favorita," the court holding:

"The alleged depreciation in the market which is said to result from the mere fact that a vessel has once been injured and repaired, depending upon prejudice or apprehension, when the intrinsic value has been made good, is too indefinite and variable to be allowed as damages."

The Favorita, 8 Blatchf. 539.

s. c., Fed. Cases No. 4,695.

The Favorita went to the Supreme Court on the whole record and was affirmed. See

The Favorita, 18 Wall 598.

Judge Benedict of the District Court for the Eastern District of New York decided the case of the "Osceola" by the same rule, saying:

"The testimony certainly indicates that for some reason or other the boat was not as available after the repairs as she was before the collision, but it does not appear to me to be sufficiently certain to justify the allowance of any additional sum as damages caused by the collision. It is hardly a case where intrinsic and inevitable diminution of value is shown to have resulted from the collision, because it was not possible to make complete repairs."

The Osceola, 34 Fed. 921.

In the case of the "Isaac Newton," Judge Nelson had occasion to pass upon this question, and disallowed an item for permanent depreciation, saying:

"This item is founded on the evidence of the

master and the mate, and is a matter of opinion, resting upon no fact stated except that the vessel leaked more after the repairs than before the damage occurred. The shipmaster who repaired her states that she was thoroughly repaired and was put in as good condition as before the injury. The work was done under the direction of the master of the vessel and, from the sum expended in making the repairs at his instance, it would be somewhat strange if the depreciated value should be as large as he states."

The Isaac Newton, 4 Blatchf.. 21.

s. c., Fed. Cases No. 7,091.

The Supreme Court sustained Judge Nelson's ruling as to conjectural and speculative damages, citing the "Isaac Newton" in the case of the "Conqueror" (166 U. S. 110, at page 128), and referring to an earlier case, the "R. L. Mabey" (4 Blatchf. 439), which has been taken on appeal to the Supreme Court and there affirmed. See

Sturgis vs. Clough, 1 Wall 269.

The appellee undoubtedly will cite to the court cases in which an allowance for permanent depreciation has been sustained, but an examination of the authorities will show that in each case the allowance is based upon some patent, visible, known and certain defect resulting from the collision which is not capable of economical repair. The case of the "McIlvane," recently decided in the District Court for the Eastern District of Virginia, is of this class

and sustains clearly the contention of the appellant in the case at bar.

Restitutio in integrum is the rule of damages in collision cases, with this modification: If the injuries are such that all of them are not capable of economical repair, damages in consequence thereof for permanent depreciation may be allowed if proved. In making the repairs, ordinary business judgment and discretion must be employed; and, if the repairs made exceed the damages which would have been assessed on a total loss, such excess will be disallowed. If, therefore, ordinary business judgment and discretion say that the loss of putting a vessel in repair is not warranted, damages for the consequent permanent depreciation may be allowed. But such damages are not allowed unless a permanent depreciation of this character is proven, of which there is no proof in the case at bar.

There is not a word of testimony in the case showing or tending to show that the "Stimson" was not, after repair, as serviceable, and indeed she was in the same trade, and performing the same functions and presumably acquiring the same earnings, as before.

As to the Sixteenth Assignment of Error:

> *The Court erred in allowing interest from any date prior to the date of the final decree herein.*

This Court has decided recently in the case of the "T. C. Reed," or *Burrows vs. Lownsdale,* 133 Fed. 250, that it is the settled law of this country in admiralty that

whether or not interest on the amount of the damages in a cause of collision shall be allowed by the court of the first instance, or by the appellate court, is a matter for the discretion of the court, citing as authority *Hemmenway vs. Fisher,* 20 How. 258; the *Ann Caroline,* 2 Wall 538; the *Scotland,* 118 U. S. 507; the *North Star,* 62 Fed. 71. The Court held that the discretion of the Court did not extend to an allowance of interest for damages recovered for personal injuries. An examination of the authority cited will show that in each case the damages assessed were as for a total and not a partial loss and that in every case where any one of these authorities has been followed and interest allowed the facts show a total loss. Indeed, while these cases undoubtedly are authority for the proposition decided in the "T. C. Reed" it will be noted that in each case interest was refused. We submit that interest is not to be allowed as "interest" strictly, but its allowance is a tool in the hands of the Court for working even-handed justice between the parties. Its purpose is so stated by Chief Justice Taney in his opinion in *Hemmenway vs. Fisher:*

> "More in cases of collision and salvage, and more especially in the latter, it is impossible to fix the sum that ought to be awarded with absolute certainty by any rule of calculation. It must depend mainly upon estimates and the opinions of persons acquainted with the subject; and acting upon mere estimates and opinions, different minds unavoidably come to different conclusions as to the amount proper to be allowed.
>
> "And it will sometimes happen in an admir-

alty case, that this court will think that the damages estimated and allowed in the circuit court are too high, and yet the opinion here may approximate so nearly to that of the court below, that this Court would not feel justified in reversing its judgment. Besides, new testimony may be taken here in an admiralty case, and a new aspect given to it. No rule, therefore, fixing any certain rate of interest upon decrees in admiralty, whenever the decree is affirmed, could be adopted with justice to the parties. And a discretionary power is reserved to add to the damages awarded by the court below, further damages by the way of interest in cases where, in the opinion of this court, the appellee upon the proofs is justly entitled to such additional damages. But this allowance of interest is not an incident to the affirmance affixed to it by law or by a rule of court. If given by this Court, it must be in the exercise of its discretionary power, and, *pro tanto,* is a new judgment."

Hemmenway vs. Fisher, 20 How. 258.

We are not aware of any case where interest has been allowed by the court of the first instance except in the way of quasi-punitive damages, or for the purpose of working substantial justice. The case at bar does not call for the exercise of such power. Each and every claim of the libellant was allowed to the full amount, and the record shows that the libelant charged everything which, by any stretch of imagination, ought to be charged, even including a doctor's bill for attendance upon a sailor who was scalded some six weeks after the collision occurred (see Record, p. 562.)

Although the libelant's surveyors—two of whom were employed afterward in making repairs, and who therefore may be assumed to have made liberal estimates of the amount of the damage—placed the probable cost of repairs to the "Stimson" at $8,500, we are now called upon to pay the sum of $21,612.75, or, excluding the interest charge, $18,680; so that it does not appear that any allowance of interest is required to meet either of the purposes for which interest has been allowed in the admiralty.

Certainly the facts in this case do not show any ground for inflicting punitive damages upon the appellant. The "Rickmers," her master, officers and crew were strangers to these waters. She took a pilot on board and obeyed his directions in all matters. The court below holds the "Rickmers" responsible for the acts of the pilot, and a careful reading of the opinion justifies the conclusion that the pilot's selection of the anchorage is the only act of negligence of which the court finds the "Rickmers" guilty. Certainly the anchorage chosen was not so obviously improper that the "Rickmers" should be held in punitive damages because she broke from her holding ground under stress of weather which all the witnesses agree was a tempest while it lasted, and, drifting helplessly, blown about by the fury of the elements, under no control or possibility of control, came into collision with a craft which was at least a full half mile from the anchorage from which the "Rickmers" had been blown away. We submit that the case is quite different from that of a vessel under control which comes into collision with a ves-

sel at anchor because of an incompetent lookout or some fault of navigation which shows a heedless disregard for the safety of others. In such cases punitive damages are proper; but we submit to the conscience of the court the appellant in the case at bar, even under the facts as found by the court below, has been guilty of no act which warrants anything more than strictly compensatory damages.

The unliquidated burden of a helpless creature should not be added to in this manner. It was essential and proper that the "Rickmers" should take the time for which interest is given in order to defend herself against excessive claims in this, at best, a complicated case, arising under circumstances whereby her claimant can, at the most, only be held for what we may term legal or technical fault, subsequently involved with the dereliction and fault of libelant.

If the views of this Court shall coincide with the appellant upon this question, we submit that the case of the "North Star" is authority for modifying the decree in this respect, that case holding:

> "The appellate court, when differing from the conclusions of the court below as to the grounds on which that court allowed interest on the damages awarded for collision, may modify the decree by excluding such interest."

The North Star, 62 Fed. 71.

The opinion being silent, no one can understand why the learned judge below allowed the "Stimson" interest.

Aside from the above reasons, the case being one of unliquidated *partial* loss, the interest clearly should not stand, as the general rule is that interest is only recovered in case of *total* loss. See

Sutherland on Damages, Vol. 4 (3d edition), Sec. 1294 and cases there cited.

Spencer on Marine Collisions, pp. 377 and 338, and cases there cited.

See, also,

"The Alaska," 44 Fed. 498.

"The Syracuse," 97 Fed. 978.

Brent vs. Thornton, 106 Fed. 35.

As to the Fifteenth Assignment of Error:

The Court erred in allowing libelant full demurrage of its vessel at the rate of fifty-eight dollars per day during seventy-four days of detention, and in addition thereto her necessary expenses during such detention.

The testimony upon which this item of damages in the nature of demurrage was allowed by the court was as follows:

By Capt. Peterson of the "Stimson":

Q. How much time was lost by reason of this collision on that ship?

A. Ninety days.

Q. In what business was the schooner engaged at the time?

A. In the coasting trade, the lumber carrying trade.

Q. Where were you running?

A. Between Ballard and San Pedro.

Q. Did you have a charter for her cargo to San Pedro?

A. Yes, sir.

Q. How was that charter, with reference to value of the preceding charter? The one immediately preceding it, the price?

A. Well, it was at the rate of $7.00 a thousand.

Q. Was it the same as the one before?

A. Yes, sir.

Q. How long did it take you to make the round trip before, immediately before this time?

A. Two months.

Q. What is the average time for making this trip to San Pedro?

A. Well, about two months, although we made one trip in fifty-two days, but it was about two months.

Q. You had been carrying for a little over a year in the same trade, had you?

A. Yes, sir.

Q. About how many trips did you make a year?

A. About six in a year.

Q. The average time would be about 60 days for a round trip?

A. Yes, sir.

Q. You say you had the same charter price for

the voyage for which the ship was loading at the time of this collision as the one immediately preceding it?

A. Yes, sir.

Q. Now what was the net earning of the ship for the charter immediately preceding this trip?

A. Well, I remember we had $3,500 dividends.

Q. Three thousand five hundred dollars was the net earnings over and above the expenses of the trip for that trip at the same rate of charter?

A. Yes, sir, the same rate of freight.

Q. What do you say as to whether your expenses would have been the same on this trip?

A. Well, practically the same.

Q. If you had been permitted to make it?

A. Yes, sir.

Q. What would have been the value of the charter for that trip?

A. The same as the trip before.

Q. Did you lose that charter?

A. No, I think not.

Q. Did you not have to carry that for $6.50 a thousand after you were repaired?

A. I am not sure about that; I could not swear to that.

Q. You could not swear as to that, you lost 90 days, you say?

A. Yes, sir.

Q. Now, what would have been the net earning capacity or value of that ship for 90 days?

A. Well, it would be a trip and a half.

Q. Well, how much would that be?

A. About $5,200 or $5,300 or something like that.

Examination of Peterson, Record, pp. 204-206.

On cross-examination, the witness testified:

Q. What is the capacity of the "Stimson," how much lumber could she carry?

A. She carries a little over 900,000.

Q. Well, now you spoke about—

A. Say about 920 or 950, but about 920,000 on an average.

Q. The usual price is $7.00 per thousand?

A. Yes, at that time.

Q. From here to San Pedro?

A. Yes, sir.

Q. What freight do you bring from San Pedro?

A. Coming up in ballast generally; would sometimes bring a little freight.

Q. It takes two months to make the round trip?

A. Yes, sir.

Q. The total earnings of your schooner for two months, the gross earnings would be $6,856; is that correct?

A. Yes, sir.

Q. How much would it cost to load that lumber on the schooner, that 900,000 feet of lumber?

A. Well, it cost us about 40 cents a thousand; that is besides the sailors. I do not know how we figure that.

Q. How much does it cost to unload it, outside of the cost of the sailors?

A. It will cost us— excuse me, we have to give the men 40 cents an hour and two meals a day. I do not know what that would amount to but that is what they charge us here in Ballard for loading the vessel. I don't know how much that amounts to.

Q. If you paid 40 cents a thousand for loading, the loading would cost you about $380?

A. Something like that.

Q. How much would it cost you to unload?

A. It would be about the same.

Q. About the same for unloading?

A. Yes, sir.

Q. Now, 80 cents per thousand would represent the cost of loading and unloading at both ends.

A. Yes, sir.

Q. That is correct, is it?

A. I made a mistake; it is 40 cents an hour; I did not mean 40 cents a thousand feet.

Q. Can you tell how much it would cost per thousand to load it, how much would it cost to load 950,000 feet of lumber on the "Stimson"?

A. We load her for about 20 days.

Q. Can you give us in money what it would cost to load her?

A. I never figured it that way.

Q. Was it as much as $1,000?

A. No, not quite as much as that.

Q. Was it $500?

A. Yes, sir.

Q. Seven hundred and sixty dollars?

A. Maybe about $800.

Q. And the same amount to unload it?

A. Yes, sir.

Q. That would be $1600.

A. Yes, sir.

Q. How much crew did you carry?

A. We had ten all told.

Q. And what is the wages of the crew per month including yourself?

A. Five hundred and fifteen dollars exactly per month.

Q. Now there was some cost of provisions for these few months?

A. The stores and the ship's chandlery amount to about $600 or $700.

Q. Well, then the cost of making the round trip from here to San Pedro with 950,000 feet of lumber is about $3,300?

A. Yes, sir, that is about as near as I can tell.

Q. So that the net earnings of the schooner with-

in any two months would not exceed over $3,-500?

A. No, something like that.

Q. That is correct, is it?

A. That is pretty near, as near as I can guess at it.

Q. You do not count anything in the way of interest, or anything like that?

A. No.

Examination of Peterson; Record pp. 231-234.

Mr. C. D. Stimson, one of the owners of the schooner "Stimson" testified on this question as follows:

Q. What trade was she (the "Stimson") engaged in?

A. In carrying lumber from our mill coastwise to San Pedro and down there.

Q. What was the average period consumed in making a round trip, a round voyage?

A. We made six trips in twelve months, a little over six, pretty near six and a half.

Q. Was she under charter at the time of the collision?

A. Yes, sir.

Q. For carrying lumber to San Pedro?

A. Yes, sir.

Q. What is the charter rate per thousand feet?

A. Seven dollars per thousand.

Q. On the lumber?

A. Yes, sir.

Q. What was the charter rate for the preceding trip?

A. Seven dollars.

Q. How much time did the preceding trip occupy?

A. I do not remember the date but very close to sixty days, I think a little less.

Q. Do you know what the net earnings, that is, after paying all the expenses of the preceding voyage was, what the net earnings of the "Stimson" was?

A. It was very close to $3,500. I think a trifle over $3,500.

On cross-examination, the witness testified:

Q. That was carrying 950,000 feet?

A. That was carrying—I do not just remember what cargo she had on at that time but I remember he turned in a little over $3,500.

Q. At the time of the collision she was loaded only to the extent of 650,000?

A. She had on 650,000 and was partially loaded.

Q. And as near as you can give the profits what is the usual profits that the "Stimson" has made on the round trip from here to San Pedro?

A. I never have made an average of it.

Q. Would it average as much as $3,500?

A. At $7.00 a thousand, yes, it would.

Q. Well, have you been paid $7.00 a thousand?

A. We got $7.00 a thousand for a number of trips previous.

Q. And that would be an estimate, $3,500 for a round trip?

A. Yes, sir.

Q. In sixty days?

A. In sixty days, yes. We made six trips in twelve months and a little over.

Testimony of C. D. Stimson, Record pp. 238-240.

Mr. F. S. Stimson, one of the owners of the schooner "Stimson," testified on this question as follows:

Q. Do you remember what the net earnings of the "Stimson" was for the voyage just preceding?

A. About $3,500.

Q. Did she average that?

A. Yes, sir.

Q. She had a charter at that rate at that time when she was loading?

A. Yes, sir.

Q. Was it for a full cargo?

A. Yes, sir.

Q. That is, her charter authorized her to take at that rate all her carrying capacity?

A. All she could carry.

Q. The average period for her trip was how long?

A. Two months.

Q. And her loss of time by reason of this accident?

A. There was three months.

We submit that the damages for the detention of the libelant's vessel have been measured by a rule which is unfair to the appellant here. The testimony shows that the schooner was employed by her owners in carrying cargoes of lumber from the owners' mill at Ballard to points in southern California, and that if she was under charter, it was a charter made by the Stimson brothers as the owners of the Stimson Mill Company with the Stimson brothers as owners of the schooner "Stimson"; in other words, the transactions were entirely in the hands of the libelants. There is an established and recognized trade in the transportation of lumber from Puget Sound ports to ports in southern California and many vessels similar in kind and character to the "Stimson" are engaged in this trade. The damages to the libelant for the detention of its vessel are not to be measured by the use value of the particular vessel unless that use is of particular and special value, which must be alleged and proved. Such damages are to be measured by the market price for such use. When there is no market price, evidence of the profits that she would have earned is competent. The record shows that the libelant did not allege a special and particular value and use of its vessel, but has proved its damages as though such allegations had been made, and has offered a line of proof which is competent only in cases where no market price exists. The burden is upon the libelant to prove his damages, and this burden he has seen fit to side-step by proving damages upon a theory which the law does not support.

The "Potomac", 105 U. S. 630.

The proof of the expenditures of libelant's vessel during the time she was laid up for repairs is entirely inadequate. This collision happened on December 25th, but the libelant put in proof of the vessel's expenditures from December 10th to a time fifteen days prior to the completion of repairs. This seems to have been done on the assumption that the expenses of the vessel would be about the same for any period of fifteen days. We submit that no reason is shown in the record why the expenses, if any, should not have been shown as they occured and not by any rule of thumb method of approximation when no necessity exists therefor. See

Record, pp. 230, 231, 234, 235, 545, 546, 560.

The libelant has charged also, as one of the expenses incurred because of and made necessary by the collision, a full complement of sea stores, which could not have been damaged by the collision. In fact, the record shows that all the expenses of the vessel of every name and nature were charged up to the "collision account." The libelant claims that the equivalent of these stores were used in the repair of the vessel, but we submit that there is no proof of anything of the kind beyond the mere guess work of the schooner's master. Guess work seems to be a component part of every branch of the libelant's case. As we purpose to show later, the libelant has nothing but guess to offer to show any negligence on the part of the "Rickmers", her officers or her crew. The witnesses guess as to the net earnings of the "Stimson". They guess as to the expenditures which were made for repairs, and guess as to the amount of material used in

making the repairs which they ask the appellant to pay for. We submit that no necessity can be shown for this kind of testimony. The "Stimson" was in her home port when these repairs were made. Her owners were close at hand, and their books of account could have been produced to show what the actual figures were as to all these items. The cost of making these repairs exceeds the estimates of the libelant's surveyors and is *nearly double* the estimate made by Lloyds' surveyors. Under these circumstances we think the proof does not justify the amounts allowed by the court below.

It is absolutely unreasonable that the provisions and gear of this schooner, with a crew of eleven, should be $2,620.44 during the period of detention. The low cost of maintaining a sailing vessel is where she makes her money.

As to the Sixth Assignment of Error:

> *The court erred in finding as a matter of fact that all other vessels similarly situated at the time of the accident were held securely by their anchors; and further erred in burdening the "Rickmers" with any presumption of fault because of this fact so found.*

The court below has burdened the "Rickmers" with a presumption of fault because she was the "aggressor", and has stated the presumption is strengthened by the fact that the other vessels exposed to the same force were held securely by their anchors. The record does not sustain this conclusion. The testimony is that the schooner "Corona", whose anchorage was most nearly like that

of the "Rickmers", dragged her anchors at about the same time that the "Rickmers" went adrift.

Testimony of Capt. Anderson, Record, pp. 146. 147.

The testimony further shows that the "Rickmers" and the "Corona" lay closest in shore and that the force of the wind came in gusts around West Point, so that the situation of these two vessels actually was more exposed than that of vessels lying further off shore.

Record, pp. 144, 148, 149, 151.

As to the Fifth Assignment of Error:

The court erred as a matter of law in burdening the "Rickmers" with a duty of meeting a presumption of fault under the facts and circumstances of this case; and erred further in placing upon the "Rickmers" the duty of a vessel in motion and under control to avoid a collision with a vessel at anchor.

The court below seems to have decided this case upon the theory that the "Rickmers" had been caught red-handed in an act of recklessness, and that she should be held to the duty of proving beyond a reasonable doubt that she was innocent. All the responsibility of a vessel in motion and under control to explain a collision with a vessel at anchor was placed upon the appellant, and the libelant was relieved of the burden of proving any negligence whatever on the part of the "Rickmers".

It undoubtedly is a salutary rule of the admiralty

that a vessel in motion and under control should be called upon to explain fully why she should not be held in fault for a collision with a vessel at rest. The reason is self evident. A vessel at anchor is inert and helpless except to a limited extent and, if she is anchored in a proper place and her whereabouts can be seen, vessels in motion and under control can and should avoid her. But a vessel in motion and not under control is more helpless than a vessel at anchor because she is the sport of the wind and tide and can go only where they take her. She can neither protect herself or others. To burden such a vessel with all the presumptions which exist against a vessel in control is unwarranted. The reason for the rule being wanting, the rule itself is abrogated. The presumption against the "Rickmers" should extend no further than to require her to prove that her ground tackle was sufficient and in good order; that it was used in a proper and seamanlike way, that the anchorage was a suitable and proper anchorage under the circumstances. This she did fully, and her testimony in this regard stands unrefuted.

Some courts are constantly falling into the error of enforcing against vessels adrift and striking another at rest the general presumption of fault against the moving vessel.

Such is not the law except in cases where the moving vessel is in command, or where she becomes out of command through some negligent act *within her control.* Time out of mind this has been so. Nearly all the ancient codes contain express provisions in this regard. See

Article XIV., Laws of Oleron, and Article XXVI., Ordinances of Wisbury.

Black Book of the Admiralty, Vol. 4, p. 272.

These laws are conveniently and readily found now in Vol. 30 of the Federal Cases (appendix); see pages 1178 and 1191.

The Dantzic ship laws were also positive in dividing the loss in a case such as this.

See Articles 49 and 50 of those laws, found in Vol. 4 of the Black Book of the Admiralty, page 349.

We particularly desire the court to read the ancient and fundamental doctrine in this connection found in Vol. 3 of the Black Book of the Admiralty, and particularly at pages 289 and 291 of that volume, where facts in point with the case at bar are discussed, and the rule for which we contend, justifying a division of the loss, is fully recognized. It is there said:

> "If a ship or two or a number of ships or vessels shall enter into a port, or a roadstead, or a creek, or any other place, and shall enter it together and shall moor, each ought to moor at such a distnce from the others that they can not in any way do any damage to one another. Nevertheless, if by chance, whilst they are riding in such a place, bad weather overtakes them, each of them ought to moor herself well and strongly, and do all *in her power* that not one of them shall suffer any damage, and still more that none of them shall do damage to the other. And if by chance, during such bad weather, the tackle of any of the ships or vessels shall fail her, and she shall drive

against the others and do them any damage, if the ship or vessel of which the tackle has failed has done all in her power to moor herself, and the tackle, which she had, has been good and sufficient for that ship or vessel and for one still larger than she is, the damage which has been done shall not be made good to the vessel which has sustained it, because it has not been caused by the fault of him to whom the vessel, of which the tackle has failed, belongs, still more for another reason, becaues she has done all in her power to moor herself; still further, because the tackle which has failed was good and sufficient for that ship or vessel and for one larger than her. And accordingly for the reasons above said she is not bound to make compensation for the damage which she has caused to any vessel. Nevertheless, if the managing owner of that ship, or vessel, of which the tackle has failed, shall have put out a cable by which she was moored less strongly than she ought or could have been, and the tackle which he had has not been sufficient for his ship or vessel nor even for a smaller one than her, if for those reasons above said his ship or vessel shall cause any damage, he is responsible to make good and compensate all that damage to those who have suffered or sustained it, by fault of weak or of bad tackle, which he has brought with him. Wherefore every managing owner of a ship or vessel must beware and ought to take care, that he does not use weak tackle to moor himself with, and that he does not carry cables which shall be insufficient, in order that the penalty and conditions aforesaid may not be imposed upon him.''

Where is there a word in this case which prevents the

"Rickmers" from invoking these old and wise principles? Reason and common sense tell us from the measurements that more cable meant trouble with the "Mildred" or the "Corona," or both, and there is no evidence opposed to her large amount of testimony establishing that her tackle and equipment were everything which seamanship, foresight or care could require.

The best reasoned modern decisions are all to the same effect. The reason and justice of such law are also apparent. Manifestly a helpless, inanimate ship cannot be held to the same duties as one capable of man's control. There is no more sense or justice in so doing than there would be in holding a prattling babe or a wandering idiot or insane person up to the standard of legal duties required of grown man fully *sui juris*.

We should like to see some court clearly define these lines, as there is a tendency for much of our case law in this connection to get on the wrong drift, because these lines of exceptions to the general rule have not been clearly drawn. Should this court agree, we sincerely trust it will aid both bench and bar by so doing.

Judge Hanford himself in a very recent case (the Admiral Cecille-Multnomah collision, not yet reported) expressly recognizes the principles for which we here contend, and yet the learned judge failed to apply them in favor of the helpless "Rickmers," acting, as she was, without actual or presumptive wilfulness or intent to injure the "Stimson," but applies them in favor of the "Multnomah," a steamboat under way, in the case referred to. The reasoning of the learned judge and the authorities of the

Supreme Court of the United States cited by him being exactly in line with our contention here, that it will not do for the "Stimson" to say that her greater diligence, by the watchman calling the full crew to his assistance, or the failure to hoist or clew a sail, or to promptly call the aid and judgment of her officer in command, or to have observed and prepared to meet the danger during a full half hour for that purpose, *would not* have prevented the collision. She must show that such diligence and efforts on her part *could not* have done so.

A duty incumbent by reason of fixed law existing for time immemorial should be enforced with the same exactness as a duty created by statutory law, which duties were under discussion by the Supreme Court of the United States in

Richelieu Nav. Co. vs. Boston Ins. Co., 136 U. S., p. 422;

Belden vs. Chose, 150 U. S. 699, and

U. S. vs. St. Louis & Miss. Trans. Co'y, 184 U. S. 255.

The ancient *lex scripta* of the maritime law, when recognized by present day usages and decisions, is entitled to all the weight and application of modern statutory or written laws.

As to the Eighth Assignment of Error:

The court erred as a matter of fact and of law in finding that the anchorage of the "Rickmers" was chosen improperly.

We are not aware of a single word of testimony in the record which shows or tends to show that the anchorage chosen by the pilot of the "Rickmers" was in itself unsuitable or improper. The testimony of all the witnesses, including the libelant's witnesses, agree upon this point. Richard Sennin, mate of the "Stimson," a witness called by the libelant, testified as follows:

Q. Well, the position of the "Rickmers" was rather in a protected place, was it not, from the wind?

A. Yes, sir, it ought to be; it was the closest under the bluff from the land.

Q. Considered a safe place to anchor?

A. Well, sometimes it might be and sometimes it might not.

Q. Well, under ordinary circumstances?

A. Well, that night it was not a safe place anyhow. The wind was blowing from the south southwest and it was not a safe place there.

Q. It was safer than where the "Stimson" was that night?

A. Yes, sir.

Q. How was it after five o'clock in the evening?

A. At five o'clock in the evening the wind was south southwest.

Q. Was it blowing very hard then?

A. It was not blowing very hard then.

Q. You considered it a perfectly safe place to anchor where the "Rickmers" was at that time?

A. It might have been safe then but not with that kind of a chain.

Record pp. 193, 194.

Capt. H. H. Morrison, pilot and captain of the tug, a witness called by the libelant, testified as follows:

Q. Describe what occurred there when you first came in (to Shilshole bay) and what situation you found.

A. I went into Shilshole bay and found three vessels loading, and when he got his anchor out, I took her up ahead and a little to one side of the "Corona" to get in the best berth I knew, and he let go his anchor and seemed to be pleased with the berth; and she dragged.

Q. I will ask you to state what that situation is, whether it is a good anchorage there?

A. It has been a harbor ever since I have been tugboating. Ships have been riding there ever since I can remember.

Q. How long have you been the master of a tugboat?

A. Fourteen years, going on fifteen.

Q. Have you frequently anchored sailing vessels there before?

A. Yes, sir.

Q. You are familiar with the anchorage in Shilshole Bay?

A. I am.

Q. And in the different portions of Shilshole Bay?

A. I have sounded it all over a dozen times.

Q. What is your opinion as to whether the berth to which you took the "Rickmers" was or was not a good safe berth, considering the weather, the character of the weather, the character of the wind, and all other circumstances including the location of the other ships?

A. Well, I consider it the best berth which was vacant at that time.

Q. What do you say as to whether it was a safe berth, in your judgment?

A. I consider it a safe berth.
Record, pp. 420, 421.

Capt. Whitney, a witness called by the libelant, testified as follows:

Q. Captain, are you acquainted with Shilshole bay and the character of that bay as a harbor?

A. Well, yes, I think I am. I have laid there for shelter a good many times.

Q. What do you think of its general character for a harbor in the southerly winds and storms?

A. I consider it a pretty good harbor. I have laid there with logs and they have to be taken care of pretty well.

Q. I wish you would examine this diagram which is marked Claimant's Exhibit No. 12. Now, as appears on this diagram, on the night of Dec. 25th, 1901, the following vessels were at anchor in Shilshole bay, the

"Stimson" approximately at the point or cross at the letter "S", the "Corona" at the point indicated by the cross at the letter "C", the "Mildred" at the point indicated by the cross at the letter "M", and the "Rickmers" at the point indicated by the cross at the letter "R". The distance according to this chart of the respective locations would be between the "Rickmers" and the "Corona" about three-sixteenths of a mile, and between the "Rickmers" and the "Mildred" about three-sixteenths of a mile with a southerly wind blowing at from fifteen to thirty miles an hour or upwards. Would you say that is a suitable and proper berth for the "Rickmers"?

A. Why, eleven hundred feet ought to be berth enough for a ship. How long was this "Rickmers"?

Q. Two hundred and sixty-seven feet.

A. How much cable did she have all told?

Q. All told, one hundred and thirty-five fathoms.

A. Yes, sir. Eleven hundred feet is far enough.

Record, pp. 442, 443.

These witnesses of the libelant unite in testifying that the "Rickmers'" anchorage was not unsuitable or improper. The claimant in the court below certainly introduced no testimony tending to contradict it, and there is no testimony in the record which tends to show any different state of facts. The court below, however, finds

as a fact "that inexcusable error was committed in choosing the place of anchorage," and on this finding alone declares that the "Rickmers" alone was in fault and decrees damages against her. We submit that the testimony of two skilled navigators, officers of the United States navy, educated and trained in questions of practical seamanship at the expense of the government, in whose hands are placed vessels which cost millions of dollars and the safety of hundreds of lives, is entitled to respectful consideration by the court. These witnesses could have no bias and are above suspicion. They unite in declaring that the seamanship displayed by the officers and crew of the "Rickmers" is not open to criticism, and particularly declare that the anchorage chosen was suitable and proper. We submit that the testimony of Captain John McT. Panton is entitled to weight. The record shows that he has navigated trans-Pacific passenger vessels of the first class for years in these waters and is a trained and educated seaman. He testifies that the facts in the case show no want of seamanship or care on the part of the "Rickmers", and particularly states that the anchorage chosen was suitable and proper. Finally, the witnesses called by the libelant, experts and others, however much they may criticise the acts of the "Rickmers" in other respects, unite in saying that the anchorage chosen was suitable and proper. So far as the record in this case shows, the learned judge of the court below stands alone in the opinion that "inexcusable error was committeed in choosing the place of anchorage," and, while we bow to his knowledge and learning in the law, we submit respectfully that his opinion on a question of practical seaman-

ship ought not to outweigh the united opinions of all the witnesses in the case.

As to the Ninth Assignment of Error:

The court erred in finding as a matter of law that the "Rickmers" was to blame for the causes leading up to or contributing to the collision.

Whatever presumption of fault is charged properly to the "Rickmers" has been met fully and overcome. The record shows conclusively that the barque lay in safety at her anchorage until the hook in the relieving tackle straightened out, bringing the weight of the ship on to the iron chain with a jerk. It is important that the description and purpose of this relieving tackle should be understood. A heavy iron chain has little or no elasticity, and the purpose of the relieving tackle is to give a certain amount of spring to the ground tackle, so that the cable may take a sudden strain gradually. It is made by weaving a heavy manilla rope about the cable and hooking the bight of the rope into the hook of a tackle which in turn was made fast to the mast. The elasticity of the rope and tackle is a protection against sudden strains and jerks. When the hook gave way the weight of the ship came upon the slack of the iron chain with a jerk, the cable parted and the weight of the ship was thrown entirely upon the starboard ground tackle suddenly and with sufficient force to tear the starboard anchor loose, thus sending the ship adrift. Common sense tells us that no tackle or gear could have stood this.

Testimony of Braue, Record, pp. 65, 66, 78, 79, 80, 81.

Testimony of Schwarting, Record, pp. 47, 48, 49.

Testimony of Schank, Record, p. 97.

Testimony of Kevister, Record, p. 122.

Testimony of Von Freiben, Record, pp. 124, 125.

If the ship is to be charged with negligence because of these facts, the finding must be based on one or more of the following propositions:

(a) The ship was insufficiently found in ground tackle and appliances.

(b) A want of good seamanship was shown at the time the ship first came to her anchorage, resulting in the breaking of her port compressor and disabling partially her port ground tackle.

(c) A want of good seamanship in the means taken, or in failing to take proper means, to repair the damage to the port ground tackle.

(d) A want of good seamanship in failing to pay out more cable on one or both of her anchors.

It is impossible to conceive of any further proposition or act of the "Rickmers" which would constitute negligence.

The record shows that the libelant made no effort in the court below to prove the "Rickmers" in fault on any of the first three of these propositions, so that the appel-

lant is under the burden of rebutting merely the presump tion of some fault arising from the fact that his vesse went adrift; in other words, he has to meet nothing mor than the doctrine of *res ipsa loquitur*. This doctrine doe not shift the burden of proof, but operates merely to shif the burden of proving, which is vastly a different proposi tion.

> *Central Bridge Corporation vs. Butler,* 2 Gra 132.

Whatever burden the appellant may be called upo to meet, we submit that he has met it fully. Let us con sider the above four possible grounds of liability in thei order:

That the ship was fully found in ground tackle i shown by the certificates of Lloyds and of the Burea Veritas.

> Record, pp. 53, 54, 55, 56, 129 (and stipula tion relating thereto), 130, 131. See, also Claimant's Exhibit No. 2.

The mate of the "Rickmers" describes the compres sor in detail and says that it was in good order and suffi cient for the purposes for which it was used:

Q. Are you familiar with compressors on ships of this kind?

A. Yes, sir.

Q. How did this compressor on the "Rickmers" compare with compressors on ships of that size and class?

A. I would say it was all right and strong enough.

Testimony of Braue, Record, p. 64.

Captain Schwarting testified:

Q. Captain, that compressor on your ship; how does that compare with compressors on other ships of similar size and capacity as to strength and durability?

A. I don't understand.

Q. What I am getting at is this: The compressor on your ship was of the kind that is usually used on ships of that size?

A. Yes, sir.

Q. Was it in good order?

A. This was in good order; yes. We are laying to the same anchor chain at Dungeness; with the same anchor.

Q. Was the machinery connected with the running out of the anchor chains in good order, if you know?

A. Yes, sir.

Q. How do you know?

A. We take it off every voyage and about three or four days before coming to port we put it on again.

Q. When was the last examination made of this compressor and the anchor chains before this accident? When was it examined last—looked over?

A. I don't know. It is in the book in the vessel.

They are examined. The last examination on the last voyage from Nagasaki to here. We cleaned it all and put it on three or four days before we got to port.

Q. I don't mean examinations that you have in your book, or anything like that; but what examinations were made on the ship?

A. Three or four days before coming into port we took it off and cleaned it up.

Q. When it was taken off was it in good order?

A. Yes; when we cleaned it and when we put it on it was in good order.

Q. You mean by that the anchor chain windlass and the compressor? Everything was examined, was it not?

A. Yes, sir.

Q. And that was three or four days before you arrived at Salmon bay?

A. No; before we got in to Flattery.

Testimony of Schwarting, Record, pp. 38, 39.

Boehnke, the blacksmith and general machinery man of the ship, testified as follows:

Q. Mr. Boehnke, state whether or not before you arrived here at the Sound you made any examination of the compressor and windlass and chains on this ship, the "Rickmers."

A. Yes; I always do. I take them off and put them away and look at them and put them together again.

Q. Did you put them in position before you arrived here in the Sound?

A. Yes, sir.

Q. How long before?

A. A couple of days.

Q. How did you find them—in what condition?

A. They were all right.

Q. How much did you take the machinery apart, connected with the compressor and the windlass and all that; what did you do with it? Did you take it all apart?

A. Not all; the stoppers and the screws.

Q. You took them apart and looked at them?

A. Yes, sir.

Q. They were all right?

A. Yes, sir.

Testimony of Boehnke, Record, pp. 114, 115.

P. G. Hill, Lloyds' surveyor for Puget Sound ports, testified as follows:

Q. Captain Hill, how did you find the cables of the "Rickmers"—that is, what was left of them—as to being up to Lloyds' requirements?

A. They were Lloyds' test cables, the best make of cable, which have been classed in Lloyds' some time previous.

Q. What would you say as to whether her entire ground tackle, including cables, was sufficient as required for such class of vessels in the seafaring world, if you know?

A. My opinion was that they were in good condition.

Q. Were they up to the standard required on that class of vessel?

A. They were up to the standard required on that class of vessels; yes, sir.

Q. Was that the case also with the compressors?

A. That was the case also with both compressors.

Q. How was the windlass?

A. The windlass was up to the standard previous to the accident.

Testimony of Hill, Record, pp. 272, 273.

Captain Walker, assistant Lloyds' surveyor for Puget Sound ports, testified as follows:

Q. Now, in making these various surveys of the "Robert Rickmers" after that collision, did you make any particular examination of her cables and of her entire ground tackle?

A. We made a very careful examination of the ground tackle that was left.

Q. Including the cables?

A. Yes, sir; the ground tackle, cables and anchors.

Q. Including the cable and compressors?

A. Yes, sir.

Q. That is, all that was left of it?

A. Yes, sir.

Q. What condition did you find them in?

A. The anchors and cables were good.

Q. What would you say as to whether they came up to Lloyds' requirements in size and quality of material?

A. They came up to them; coincided with Lloyds' requirements.

Q. And with the Bureau of Underwriters' rules?

A. I am not acquainted with those rules; but I think that Lloyds' are in excess of them.

Q. In excess?

A. Yes, sir; in regard to dimensions and the excess required on ground tackle.

Q. Are Lloyds' requirements or rules in regard to tensile strength or testing strengths of any kind less than any of these other shipping bureaus or organizations?

A. No, sir; Lloyds' is acknowledged as the highest class throughout the world.

Q. Now, what condition did you find them in?

A. The anchors and cables, the remaining anchors and cables were in first-class condition.

Q. In what condition did you find the compressors?

A. The starboard compressor was all right, and the port compressor was slit in two and broken.

Q. To what extent, if any, did you examine the port compressor to determine the cause of the break?

A. We made a careful examination of the port compressor to determine whether it could be repaired or not, and also what was the cause of its breaking or damage, and whether it would be necessary to renew it.

Q. Were you able to determine the cause?

A. Yes, sir.

Q. Could you discover the cause from any outward or inward appearance of the compressor or compressor block?

A. The compressor and the compressor block had been forced apart by the cable being drawn through the same.

Q. Just explain that, if you think you know, whether from an investigation that you made or from an examination of those broken parts, what the cause was? Just tell us in your own way.

A. From the examination made at the time I could see that the cable which fits into the compressor—the compressor is a cast-iron block with a raising and lowering tongue, and this sets on a wooden block with holding bolts going right through the deck and beams—the cable had been lying in this compressor, which exactly fits the links, and if any undue or excessive strain comes on it, it would haul the cable forward and spread the block apart, and this was the way the block was split; the cable was hauled forward—the vessel coming back hauled the cable forward and forced the block apart.

Q. Would any ordinary strain upon the anchor or any usual ordinary strain on ships at anchor have that effect?

A. No, sir; certainly not; as the compressor is made to hold the vessel. The idea of the compressor is, after the vessel is once moored, to take the strain off the windlass after it has lowered the anchor, and then it is thrown on

the compressor, which is made in such a way that the cable cannot slip through it.

Q. If no ordinary strain could have that effect, how do you account for it?

A. It was an extraordinary strain, due to the elements, an excessive gale of wind at the time, and the anchor holding fast.

Q. Have you any idea as to the force or velocity of the wind which would produce such an effect as that?

A. Why, I don't know what the force or velocity of the wind was at that time.

Q. Do you think anything less than a maximum storm or hurricane could produce the effect you saw?

A. It would require a very severe gale to do such a thing, or a very swift tide.

Q. To what extent are you familiar with vessels of a similar class to the "Rickmers" and with their compressors, their ground tackle and equipment?

A. To what extent am I familiar with them?

Q. Yes, sir.

A. My whole business has been with them practically all my life.

Q. Well, now, how did this ground tackle on the "Rickmers," and particularly her compressors and particularly her compressor block—everything—compare with similar tackle on similar ships?

A. Very favorably.

Q. Do you know of any way that the compressor and compressor block could have been made any safer? Could it have been constructed in any safer manner?

A. No; it was constructed on normal lines. The design is as good as can be made, and all vessels are practically constructed on the same lines as far as the compressor is concerned. That is the type of compressor adopted by various shipbuilders throughout the world.

Testimony of Walker, Record, pp. 288, 289, 290, 291, 292.

We submit that the testimony is full, complete and conclusive that the "Rickmers" was fully found in the very best class of ground tackle and appliances, and that the record contains no evidence which tends to show the contrary. Whatever presumption may be laid upon us in this particular we have met fully and completely.

As to the second possible ground of liability, viz.: A want of good seamanship at the time the ship first came to her anchorage, resulting in the breaking of her port compressor and disabling partially her port ground tackle, we have submitted the case to the ablest practical navigators whom we could find, to two officers of the United States navy, and to a commanding officer of one of the largest and best navigated passenger steamships, who has been taking his vessel in and out of Puget Sound for years. These men have had in their charge vessels of the highest value and upon their nautical skill and judgment has rested the safety of hundreds of lives. They are above sus-

picion of prejudice or bias, and we earnestly submit that their opinion is entitled to all the weight which English courts of admiralty give to the Elder Brethren of Trinity House. These witnesses, Lieutenants Lopez and Symington of the navy, and Captain Panton of the "Victoria" and the "Arizona," unite in saying that no want of judgment or of good seamanship was shown in this respect, and we refer the court particularly to their testimony in which, in answer to hypothetical questions carefully framed to include all of the material elements of the case, they sustain and endorse the course pursued by the "Rickmers" in every respect. See

Testimony of Symington, Record, pp. 301-311.

Testimony of Lopez, Record, pp. 314-323.

Testimony of Panton, Record, pp. 373-384.

So far as this possible ground of liability is concerned, the libelant put in no testimony to show any want of good seamanship on the part of the "Rickmers." The testimony of all the witnesses sustains the conclusion that everything was done which should have been done, and that nothing was done which ought not to have been done.

What has been said in discussing the second possible ground of liability is true of the third possible ground, viz.: A want of good seamanship in the means taken, or in failing to take proper means, to repair the damage to the port ground tackle. The reliable and competent witnesses who endorsed and approved of the seamanship of the "Rickmers" in other respects, were equally clear and em-

phatic in their endorsement and approval in this respect. It is true that the libelant made some attempt to criticise because the master of the "Rickmers" did not "sight" his port anchor after the breaking of the port compressor, but his criticism did not appear to be of weight to the expert navigators who testified, and to the non-nautical mind it is difficult to see upon what the criticism was based. The damage to the port ground tackle was the breaking of the compressor, something which could not have happened if the port anchor had not taken hold of the ground. The "Rickmers" was hauled back to her anchorage by hauling on her port chain and anchor, with the assistance of the tug, so that the fact is clear that the port anchor and chain were holding fast at this time. Having dropped his starboard anchor, why should the master of the "Rickmers" disturb his port tackle? Having rigged a relieving tackle thereon, it surely would have been unwise to put a further strain upon his weakened tackle, and it was eminently wise to rely on his starboard tackle, together with such assistance as the port tackle, repaired as fully as possible with the means at hand, to hold his ship safely at her temporary anchorage until the tug should take her to her destination. Those who criticise his navigation in this and other respects were masters of small coasting schooners, cronies and intimates of the master of the "Stimson," banded together in a common desire to "soak the Dutchman," a spirit which has brought the ports of Puget Sound into disrepute in foreign shipping circles and which operates to the detriment of the commerce of these ports.

Upon the fourth possible ground of liability, viz.: A want of good seamanship in failing to pay out more cable

on one or both of her anchors, the libelant has submitted enough testimony so that it may be said in fairness the record contains sufficient testimony to present a question for the court to decide. We are confident, however, that a careful consideration will decide this question in favor of the appellant. It will be remembered that the "Rickmers" was in ballast, light and high out of the water, showing more freeboard and exposing a greater surface to the wind. The wind itself was not true, but blew in gusts of hurricane force at times, with intervening times of comparative calm, not always from one direction, but veering from southeast to southwest. It does not need an expert to know that under such circumstances too much scope of cable would be worse than too little, since the vessel must pitch and toss and wrench and wrack herself and her ground tackle more with a long than with a short scope. As long as her scope was sufficient to hold her, that scope was sufficient. The testimony of the appellant's experts is that her scope was sufficient, and the testimony of her officers and crew is that the vessel did not drag, but held her position until the hook gave way on her port relieving tackle, when her port chain cable snapped as one snaps a string by allowing it to hang loose and tautening it with a sudden jerk. This threw the weight of the ship suddenly upon the starboard tackle, which stood the strain without breaking, showing again that there could be no general defect or decay of her ground tackle, such as would result from age, excessive wear, or the like; but the starboard anchor was dragged from its holding ground and set the ship adrift. These things happened in rapid succession while the storm was at its height, blowing with hurricane force over the waters

of the bay. We refer the court again to the testimony of Messrs. Lopez, Symington and Panton as to whether or not, from a sailor's point of view, the "Rickmers" was guilty of any want of good seamanship. Where the testimony is conflicting, the court is bound to consider the capacity, skill, responsibility and impartiality of the witnesses, especially upon matters of opinion. We trust this question to the court in confidence that the weight of testimony upon this question is greatly in the appellant's favor, and this hearing being in effect and under the admiralty practice a trial *de novo,* the view of the learned judge below is not entitled to the weight conceded to trial courts on the facts, particularly when a case such as this was not heard in the presence of the court below, who had no more opportunity than this court to see or hear the witnesses.

A resume of all the facts in this case shows that the damages for which this cause is brought were the result of the force and fury of the elements and of inevitable accident. The court below held the "Rickmers" to a degree of care, caution and foresight which is not warranted in law, and refused to consider the accident inevitable because the "Rickmers" failed to take steps which would have prevented the accident, but, so far as we have been able to discern, the court did not point out any specific detail in which the "Rickmers" erred, except that "inexcusable error was committed in choosing the place of anchoring," a finding which is not supported by the testimony and is not in harmony with the opinion of every competent mariner who testified in the cause.

To maintain the defense of inevitable accident, the

party charged need show only that he exercised ordinary care, caution and nautical skill.

The Mabey and Cooper, 14 Wall 215.

The Supreme Court in thus defining inevitable accident followed its earlier decisions in the *"Morning Light,"* 2 Wall 550, and the *"Grace Girdler,"* 7 Wall. 196. This rule has not been changed by subsequent decisions, and, founded as it is in reason and justice, requires no change. It has been applied in many subsequent cases. In *Arbo vs. Brown,* 9 Fed. 318, a dismantled river steamboat was moored safely, according to the weight of the evidence, but broke loose in a storm and drifted into libelant's vessel. The Circuit Court held it to be a case of inevitable accident. In the *"Florence P. Hall,"* 14 Fed. 408, a vessel running free with the wind dead aft came into collision with a smaller craft close hauled, the weight of the evidence being that the night was foggy. Held, to be a case of inevitable accident. In the *"Olympia,"* 52 Fed. 985, a steamboat going up the Detroit river at full speed was starboarded to avoid a steamboat having two schooners in tow. Her tiller (wire) rope parted and she came into collision with one of the schooners. The evidence showed the rope to be of suitable size and that it had been inspected by the mate and a hand who repaired it shortly before the collision. The District Court held it to be a case of inevitable accident and this decision was sustained on appeal: 61 Fed. 120. In the *"Mary L. Cushing,"* 60 Fed. 110, a ship moored to a wharf in the customary way broke loose during a heavy gale which shifted to the quarter which bore most heavily upon the ship. For a resulting collision she

was held blameless, the accident being inevitable. In the case of the *"Austria,"* 14 Fed. 298, the District Court for the District of California, following the Supreme Court in the *"Grace Girdler,"* defines inevitable accident as where a vessel is pursuing a lawful avocation in a lawful manner, using proper precautions against danger, and an accident occurs; it is enough that the caution exercised should be reasonable under the circumstances, such as is usual in similar cases. The highest degree of caution is not required. In the *"Austria"* the ship was moored in the usual way at an Oakland wharf, the weight of the evidence being that the mooring was proper and sufficient under ordinary circumstances. She tore loose from her moorings in a storm, making it necessary for libelant's vessel to shift her position, resulting in injury. Held to be a case of inevitable accident.

In every case where the rule has been invoked and not followed some manifest want of care appears clearly. In the *"Columbia,"* 48 Fed. 325, a large steam elevator attempted to cross the North river when the wind was blowing at a rate which her pilot admitted made it unsafe for her to attempt a mooring while to windward. In making such attempt she came into collision, although there was only a fresh breeze blowing. The court refused to consider it a case of inevitable accident. In the case of the *"Bowden,"* 78 Fed. 649, the collision occurred in ordinary weather between a steamship under way and under control and a steamship which had no steam of her own, but was being shifted by a tug to another berth. The court refused to consider this a case of inevitable accident. In

the case of the *"Severn,"* 113 Fed. 578, the vessel was lying at one anchor and had made no preparation to drop her second anchor in case of necessity. In a severe thunder shower she dragged her one anchor and came into collision. Her defense of inevitable accident was held not to have been sustained, following a long line of cases in which it has been held that a vessel at anchor is bound to have both anchors ready for use in an emergency. In the case of the *"Mary S. Blees,"* 120 Fed. 45, a river steamboat under complete control came into collision with a vessel moored to the river bank because the pilot attempted a maneuver unseasonably. It was held not to be a case of inevitable accident. In the *"Rebecca,"* 122 Fed. 619, two schooners were beating to windward in a narrow river in the daytime, in clear weather. The overtaking vessel came into collision with the other at the end of a tack. Held not to be a case of inevitable accident.

In the case of the *"Olympia" (supra),* the Circuit Court of Appeals for the Sixth Circuit discussed the liability of a ship for a collision due to the breaking of some of her appliances, and held that, as to strangers, the owners of vessels are not under any liability as warrantors of the sufficiency and soundness of machinery or equipment. They are bound to use that degree of care in the selection of machinery and equipments which persons of ordinary prudence are accustomed to use and employ for the same purpose. Under this rule the "Rickmers" cannot be held to any liability because of the breaking of her compressor, and if the breaking was the cause of the vessel's drifting, no other act of negligence having intervened, the "Rick-

mers'' must be held without fault, and the accident to have been caused by one of the perils incident to ''those who go down to the sea in ships.''

The English courts of admiralty have followed the same line of decision as the courts of the United States. In the case of the *''William Lindsay,''* a British ship of 970 tons was lying at a buoy in the harbor of Valparaiso about three-quarters of a mile to windward of the barque ''Estrella.'' The buoy was not one of the buoys belonging to the port authorities and was not intended or adapted for use as a mooring buoy and was not on the usual mooring ground. A gale came on to blow; the ''Lindsay'' did not let go any anchor, but remained at the buoy as before the gale. The next day she broke from the buoy, the shackle-band of the buoy having given way, and her crew let go her port anchor in great haste, but the cable jammed in the windlass and the ship drifted into collision with the ''Estrella,'' doing great damage. The court below held it to be a case of inevitable accident, and this finding was affirmed on appeal.

The ''William Lindsay,'' 2 Asp. Mar. Law Cases 118.

s. c., L. R. 5, P. C. 338.

The decision in the *''William Lindsay''* was followed and approved in the *''Virgo,''* 3 Asp. Mar. Law Cases 285, s. c. 35 L. T., N. S. 519, s. c. 25 W. R. 397, a case very similar to that of the *''Olympia,''* 52 Fed. 985, s. c. affirmed on appeal, 61 Fed. 120, and decided the same way on appeal, reversing a decision of the court below. Both of

these cases have been cited with approval by the Supreme Court of the United States. See

The "Caledonia," 157 U. S. 145.

The "Carib Prince," 170 U. S. 663.

We submit that the case presented against the "William Lindsay" was much stronger than the case presented against the appellant here. If the doctrine of inevitable accident was held to apply in that case, the court cannot ignore it in the case at bar without disregard to established principles of maritime law and without placing upon shipowners a liability, as to anchoring and securing their vessels from stress of weather, almost co-extensive with that of an insurer.

As to the First, Second, Third, Fourth and Tenth Assignments of Error:

First: The court erred in finding as a fact that at and before the time of the collision a vigilant watch was kept on and by the schooner "Stimson."

Second: The court erred in finding as a matter of law that the schooner "Stimson" was under no obligation to abandon or shift her anchorage to avoid imminent danger of collision and to minimize the damage resulting therefrom.

Third: The court erred in finding as a fact that the schooner "Stimson," under the conditions of wind, weather and anchorage existing at and before the time of collision, could not have been maneuvered so as to avoid the collision or to have minimized the damage resulting therefrom.

Fourth: The court erred in finding as a matter of fact and of law that the schooner "Stimson" was free from blame as to matters causing or contributing to the collision.

Tenth: The court erred in failing to find as a matter of law that the "Stimson" was to blame because of her failure to take seasonable steps to avoid or minimize the results of the collision.

These matters are so interrelated that they may be best discussed together.

Was the conduct of the "Stimson" above criticism under all the facts? We submit that more substantial ground exists for a finding of fault against the "Stimson" than against the "Rickmers." She was lying at one anchor and 105 fathoms of cable nearly three-quarters of a mile to leeward of the "Rickmers." There is no evidence that her other anchor was ready for instant use, as prudent seamanship requires; indeed, there is strong presumptive evidence that it was not ready, but was encumbered by her deck cargo (see testimony of Capt. Peterson, Record, pp. 559, 560), since no use was made of it while the two vessels were locked together and dragging together toward a lee shore. She was supposed to have a watchman on duty, but this watchman did not know of the trouble to windward when the "Rickmers" broke from her anchorage and came into collision with the "Mildred." At the very least, a full half-hour elapsed from the time the collision with the "Mildred" occurred to the time of the collision with the "Stimson," and yet it appears from the evidence that no one on board the "Stim-

son'' had any intimation of trouble until just before the collision occurred. (See testimony of Sennin, mate of the ''Stimson,'' Record, pp. 185, 186; testimony of Peterson, captain of the ''Stimson,'' Record, p. 555.) The weather was clear and all the vessels were equipped with riding lights, and West Point light was a fixed point in the offing from which any competent sailor could have told whether or not vessels to windward were lying securely or had dragged from their anchorage. The ''Rickmers'' came into collision with the ''Mildred'' and carried away her foretop hamper and jibboom with a crash and noise which aroused Captain Anderson of the ''Corona,'' who testifies that he came on deck and could see all that occurred subsequently. (See testimony of Anderson, Record, p. 145.) It is inconceivable that a vigilant and competent watchman on the ''Stimson,'' who was attending to his duties, should not have seen and known of these things and the consequent danger to his ship, yet the testimony is that he did not see or know, and did not call his commanding officer until the ''Rickmers'' was on top of the ''Stimson.'' If this watchman had been attending to his duties, the officers and crew of the ''Stimson'' (for there were two officers, five sailors and a cook on board; see testimony of Peterson, Record, p. 543) could have taken steps to avoid or minimize the effect of the collision. The seamanship of the court below is again open to criticism in finding that the ''Stimson'' could not be maneuvered because she was at anchor. What happened in the afternoon, when the seamanship of the master of the ''Corona'' avoided a collision, shows what could have been done by the ''Stimson'' in the evening. Even a landsman, if ever

he has got the smell of salt water in his nostrils, knows that a vessel's head, particularly if she is schooner-rigged, can be canted to one side or the other by hauling a headsail over to windward. Indeed, it is a common occurrence in getting under way to throw the vessel on one tack or the other by hauling over a forestaysail or jib. Every nautical man who testified says the maneuver was possible, and the only criticism is that it would have to be well timed or the vessel would swing back after having run up to her anchor on one tack. But this danger could have been avoided if the "Stimson" had had her other other anchor and ground tackle ready for use; for this anchor could have been dropped to hold her in position until the "Rickmers" had passed to leeward. If necessary, the "Stimson" could have slipped her cable without great danger to herself, certainly without greater danger than she suffered by remaining supinely in the path of the "Rickmers." With a large vessel to windward dragging her anchors, the position of the "Stimson" was precarious at the best, and warranted any maneuver which promised relief. The "Rickmers" was entitled to this degree of watchfulness and care, skill and caution from the "Stimson," and the Supreme Court has held a vessel in fault for not showing it. In the case of the "Sapphire" the Supreme Court reversed a decision of the Circuit and of the District Courts below on this ground alone. The case was very similar to the case at bar in more than one respect. The French transport "Euryale" came to anchor in San Francisco harbor about 600 yards from a wharf, and put out one anchor. The American ship "Sapphire" came to anchor about 300 yards southeast of

the "Euryale" at a point farther up the harbor and farther from the wharf. A gale came up at night and the collision occurred at five o'clock in the morning, the "Sapphire" having dragged down upon the "Euryale." The "Sapphire" was alleged to be in fault for having anchored too near the "Euryale," but this charge was not sustained, the court finding that the distance was sufficient so that the one vessel did not give the other a foul berth. The "Sapphire" was found in fault, however, for not letting go another anchor. Both courts below found the "Euryale" free from fault; but the Supreme Court reversed this finding on facts very similar to those of the case at bar. We quote from the opinion:

> "But we are not satisfied the 'Euryale' was not free from fault. The captain was not on board. The first officer, though on board, was not on deck from eleven o'clock until after the collision. Le Noir, the third officer, was officer of the deck that night. He was called up by the head, or chief, of the watch at three o'clock to observe that the 'Sapphire' was approaching nearer to them than she had been. He attributed it to her letting out more chain, and returned below, and did not come on deck again until five o'clock, a few moments before the collision, when it was too late to avoid it. The instant he came on deck he ordered done the thing that could have saved them had it been done earlier—the jib to be hoisted. It would have sheered the vessel off and allowed the 'Sapphire' to pass her. Such is the testimony of libelant's own witnesses. It is the judgment of the first officer of the ship. Why was not this done before? Why was not the officer, on such a night, in such a gale, at his post? At

four o'clock the man in charge of the watch saw the 'Sapphire' approaching and says he made a report to that effect. The first officer says no report was made to him. But the third officer, who was officer of the deck, does not say that it was not made to him. If the fact was not communicated to the proper officer, that was in itself a fault. If it was communicated and not attended to, the case of the libelant is not bettered. But the evidence is very strong that the officer received the information. Deveaux, the head of the watch, says that he reported the fact at four o'clock; and Bioux, who had charge of the watch between four and five o'clock, says that between these hours he saw the 'Sapphire' with the wind astern, and heading the current, coming toward the 'Euryale' ; that she continued to approach gradually, and that he reported this to Mr. Le Noir between four and five o'clock. Here, then, was a clear neglect of proper precautions for an entire hour immediately preceding the collision.

"We cannot avoid the conviction that there was a want of proper care and vigilance on the part of the officers of the 'Euryale' and that this contributed to produce the collision which ensued; both parties being in fault, the damages ought to be divided equally between them.

"Decree of the Circuit Court reversed and the cause remitted to that court with directions to enter a decree."

"*The Sapphire,*" 11 Wall 164 at pp. 170, 171.

It will be noted that the failure to notify an officer of the fact that a vessel to windward is dragging is itself de-

clared to be a fault; and there is no conflict in the testimony in the case at bar that the officer in command of the "Stimson" was not notified until a moment before the collision occurred, thus depriving the "Rickmers" of the benefit of that officer's skill and judgment in averting the accident. The "Sapphire" has been declared to be a leading case, correctly stating the rules which should govern in cases of this kind (see the *"North Star,"* 106 U. S. 22), and its doctrine has been followed and cited consistently. (See 7 Rose's notes and cases there cited.)

The pleadings in the case at bar show that the claimant in the court below did not file a cross-libel, but alleged and proved his damages under the allegations of his answer. We contend that he may recover his damages *in personam* from the libelants. It is not necessary that a cross-libel be filed; it is sufficient if the answer disclose allegations of damage and proof is offered to support them.

The "Sapphire," 18 Wall 51.

It was so held in the *"Pennsylvania,"* 12 Blatchf. 67, s. c. Fed. Cases No. 10,951, where a division of damages was decreed by the Supreme Court on appeal, reversing a decree for the libelant. The claimant, not having alleged his damages in his answer, was allowed to amend on presentation of the mandate of the Supreme Court to the court below. The same rule was followed in the *"Reuben Dowd,"* 3 Fed. 528, and in *Gillingham vs. The Towboat Co.,* 40 Fed. 649. In the *"North Star,"* 106 U. S. 27, the Supreme Court, although the question was not germane to the issue there decided, took occasion to repeat and en-

dorse the position taken in the "Sapphire." We submit that no good reason exists why a respondent in a cause of collision should not allege his damages and recover therefor under an answer, provided he is content to waive his rights *in rem* and to take a decree *in personam*.

As to the Merits of the Cross-Appeal:

The libelant below, his mouth watering for his full pound of flesh, asks the court not only to sustain the decree of the court below, but also to give him additional damages for fourteen days' demurrage. The court below, upon insufficient evidence, found for 74 days' demurrage at the rate of $58.00 a day, basing the time upon the fact that, although the vessel was delayed 90 days, she was in the same relative condition in readiness for sea in 74 days that she was at the time of the collision. Certainly the cross-appellant has been treated generously in the matter of his incidental damages. We have paid his butcher and baker and candle-stick maker for all the expenses of his vessel during the time of detention. We must pay his doctor's bills, his little charges for filing meat saws, his new stovepipe for his galley, and every other conceivable charge. To have charged us for the additional demurrage which the cross-appellant claims would be carrying the punitive theory of damages still farther beyond its limit. If we are to be held for demurrage, we submit that the finding of the court below was right as to the time for which it should be computed.

The award is grossly excessive upon its face, being almost, if not quite, equivalent to half the value of the

average schooner in these waters, new or old. In addition thereto the "Rickmers" is by the decision forced to bear all of her own damage and loss, which have been very large.

The appellant in conscience and also in law is unquestionably entitled to relief.

JAMES M. ASHTON,
FRANK H. KELLEY,
Proctors for Appellant.

Additional Authority
Steinbach v Rae
14 How 532.